Lim Lip Eng v Ong Ka Chuan (as a public officer of a society registered as Malaysian Chinese Association)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-25–03 OF 2020(W)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), NALLINI PATHMANATHAN, ZALEHA YUSOF, HASNAH HASHIM, MARY LIM AND HARMINDAR SINGH FCJJ
27 APRIL 2022

Tort — Defamation — Whether political parties in Malaysia could sue for defamation — Whether political parties were capable of having a reputation that the law of defamation could protect — Whether as societies registered under the Societies Act 1966 political parties in Malaysia had no legal identity of their own and could not sue or be sued in their own name but only in the name of one of their members — Whether by not having a legal identity of their own political parties were not capable of having a reputation — Whether allowing political parties to sue for defamation was not in the public interest and was an unjustifiable fetter on the right to free speech — Whether the Derbyshire principle that barred local authorities and government bodies from suing for defamation applied with equal force to prevent political parties from doing the same

The instant appeal dealt with the relatively novel question in the Malaysian jurisdiction of whether a political party could sue for defamation. The respondent, as the public officer of the Malaysian Chinese Association ('MCA') — a political party registered under the Societies Act 1966 — filed an action on behalf of MCA against the appellant Member of Parliament for making a statement defamatory of the MCA at a press conference. The appellant applied to strike out the suit on the ground that a political party could not sue for damages for defamation. The High Court dismissed the application holding that the suit was not an obviously unsustainable one that deserved to be struck out summarily. The Court of Appeal ('COA') dismissed the appellant's appeal against that decision. In an *ex tempore* judgment, the COA held that since the question of whether a political party could sue for defamation was as yet undecided in Malaysia, it was a serious question of law which deserved to be tried at first instance by the High Court rather than for the COA to make a pronouncement upon it. In coming to its decision, the High Court relied upon the Federal Court's decision in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 ('Chong Chieng Jen') which held that the *Derbyshire* principle expounded in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011 did not apply in Malaysia. The *Derbyshire* principle held that on grounds of public interest, accountability,

A transparency and protection of the right to free speech, a local authority or government body could not sue for defamation. *Chong Chieng Jen* held that the *Derbyshire* principle was a principle of common law in England that did not require to be imported and applied in Malaysia via s 3 of the Civil law Act 1956 because s 3 of the Government Proceedings Act 1956 ('the GPA') allowed the B Federal and State Governments to sue any person in a civil proceeding, including for defamation. The High Court in the instant case relied upon *Chong Chieng Jen* because the appellant had relied upon two other cases in which the *Derbyshire* principle had been extended to political parties to say that political parties could also not sue for defamation. The two cases were C *Goldsmith & another v Bhoyrul & others* [1998] QB 459 ('Goldsmith') and *R Rajagopal @ RR Gopal @ Nakkheeran Gopal and another v Ms J Jayalalitha and another* (2006) 2 MLJ 689 ('Rajagopal'). In fact, the very question of law on which the appellant was granted leave to file the instant appeal was whether a political party could maintain a suit for defamation based on the decisions in D *Goldsmith* and *Rajagopal*. In the instant appeal, the appellant questioned the correctness of the Federal Court's decision in *Chong Chieng Jen* arguing that the court there not only failed to appreciate the crucial difference between locus standi (ie, a right to sue) and a cause of action (ie, whether an action in defamation could be maintained), but also overlooked s 39 of the GPA. The E respondent, on the other hand, relied heavily on *Chong Chieng Jen* to say that since s 3 of the GPA did not prohibit the government from suing for defamation, likewise, and by extension, nothing in s 9 of the Societies Act 1966 prohibited a political party, like the respondent, from also doing so.

F **Held**, unanimously allowing the appeal, answering the leave question in the negative, setting aside the decisions of the courts below and striking out the respondent's action as per the application of the appellant:

(1) **(per Zaleha Yusof FCJ)** The respondent as a political party could not G maintain an action for defamation. A political party had no requisite reputation to constitute a cause of action for defamation. No arguments were advanced by the respondent to show how a political party as opposed to an individual, a corporation or a government, had the requisite reputation which the law of defamation could protect. That, in H itself, was a sufficient ground to dispose of this appeal. In a defamation action, the requisite cause of action hinged upon reputation. Although the respondent had the legal capacity to sue or to bring an action, that did not ipso facto mean it had a standing to bring an action for defamation. It was locus standi in that sense that the respondent seriously lacked — I that it did not have the necessary cause of action as it did not have a reputation for and over which it could go to court to sue to protect (see paras 28–29, 34 & 90).

(2) **(per Zaleha Yusof FCJ)** Unlike incorporated bodies or companies which had separate legal identities from its shareholders and its directors, a society, like the respondent, did not have a legal identity of its own. A company had a legal personality and was not only able to possess or own property but could sue and be sued in its own name. It therefore had a reputation generally related to its trade or commerce for which it might sue to protect. A society, on the other hand, depended on its members even to sue. A society was not, on its own, a legal entity and could not even sue or be sued in its own name — see s 9(c) of the Societies Act 1966. Since the respondent had no existence separate from its members, it could not assert or claim any reputation. In the law of defamation, the absence of this most essential element was sufficient to bar the claim from proceeding any further. Even assuming the respondent had a reputation (which it did not), nothing in the respondent's pleadings or its submissions explained how that 'reputation' had been seriously injured (see paras 35–36, 39 & 86–87).

(3) **(per Zaleha Yusof FCJ)** There was no reason why the *Derbyshire* principle, which was extended to political parties in *Goldsmith* and *Rajagopal*, should not apply with equal persuasion in the context of the instant appeal. A political party relied on the public to get their votes to be in power. It put itself forward for office or to govern and be responsible for public administration. Therefore, it was not right nor was it in the public interest to put the public in fear of a defamation suit and prevent them from expressing their views or making criticisms or voicing out opinions. To allow that to happen went against the true value of democracy. As explained in *Goldsmith*, there was strong justification to withhold the right to sue to political parties. The individual members of a political party retained a right to sue (if they could prove that they were injured) but insofar as the political party itself was concerned, it could always 'answer back through public announcements', press conferences or press statements or such similar social media (see para 88).

(4) **(per Zaleha Yusof FCJ)** Based on the reasoning in *Goldsmith*, which followed *Derbyshire*, the respondent whether as a component political party in the then ruling government or as a political party on its own, clearly had no cause of action to maintain the defamation suit against the appellant. In a free, democratic society in Malaysia, the respondent must not be thin-skinned and must always be open to public criticism (see para 89).

(5) **(per Zaleha Yusof FCJ)** *Chong Chieng Jen* was of no application in the instant appeal as the provisions of the Government Proceedings Act 1956 (which were instrumental in deciding that case) were not applicable to a society, which was what the respondent was what the respondent was (see para 75).

(6) **(per Zaleha Yusof FCJ)** The present appeal should not be used as a platform to revisit the Federal Court's decision in *Chong Chieng Jen*, or to re-litigate the correctness of the approach taken in that decision. Leave was not granted in this appeal to revisit the same question of law which was decided in *Chong Chieng Jen*. The central issue there was not whether a political party could maintain a suit for defamation but whether the Sarawak State Government had a right to sue for damages for defamation. In an appeal to the Federal Court, as a matter of policy, the focus of the court's judgment must be confined to the question of law posed to the court. This court should therefore exercise restraint from re-opening and overruling its recent decisions unnecessarily so that the law was not in a constant state of flux and uncertainty. Any decision of the apex court should not be disturbed unless in the most exceptional cases. The instant appeal was not such a case. If at all, the correctness of a decision might only be questioned where an identical point of law arose for decision (see para 64).

(7) **(per Harmindar Singh FCJ, concurring)** The respondent as a political party could not maintain an action for defamation. There was no dispute that *Goldsmith* and *Rajagopal* extended the *Derbyshire* principle that a local authority did not have the right to maintain an action for damages for defamation, to political parties. It was contrary to public interest if a political party, which might in the end run a government if elected by the people, was allowed to sue for defamation the very voters who had elected it to office. The right to sue for defamation would place an undesirable fetter on freedom of speech. It was therefore of utmost public importance that a political party was open to uninhibited public criticism so that members of the public would have all the information required to make an informed decision as to which political party best represented their interests. This approach struck the right balance as any official within the political party who was sufficiently identified in a publication was entitled to sue for defamation. Further, a political party with all its resources would be well-placed to counter any unflattering comments against it (see paras 110 & 115–117).

(8) **(per Harmindar Singh FCJ, concurring)** The decision in *Chong Chieng Jen* was quite pivotal to the instant appeal and could not be ignored because if the *Derbyshire* principle had no application in Malaysia (as held in *Chong Chieng Jen*), it must follow that the reasoning applied in *Derbyshire* could not be applied to a political party as well (see para 100).

(9) **(per Harmindar Singh FCJ, concurring)** As submitted by the appellant, the decision in *Chong Chieng Jen* suffered from a fatal infirmity in that the court there had failed to appreciate the crucial distinction between a cause of action and the standing to sue. Although s 3 of the GPA 1956 enabled the government to sue in civil proceedings, it did not

mean that the government had the right to maintain an action in defamation. Also, the right to sue was not an absolute one. It had to be read together with s 39 of the GPA as correctly decided by the Court of Appeal in *Kerajaan Malaysia v Ambiga Sreenevasan & Ors* [2016] 5 MLJ 721 (see paras 107–108).

(10) **(per Harmindar Singh FCJ, concurring)** There was no reason why the *Derbyshire* principle was objectionable. The overriding principle in *Derbyshire* was that 'it was of the highest public importance that a democratically-elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech'. It was extremely doubtful if any government could ever have a 'governing' reputation. The government was representative of the people and it would be quite remarkable for the government to have a reputation although individual members in the government had the right to sue (see paras 108–109).

[Bahasa Malaysia summary

Rayuan ini menyentuh isu baharu mengenai bidang kuasa Malaysia sama ada parti politik boleh menyaman untuk kausa tindakan fitnah. Responden, sebagai pegawai awam Persatuan Cina Malaysia ('MCA') — sebuah parti politik yang berdaftar di bawah Akta Pertubuhan 1966 — memfailkan tindakan bagi pihak MCA terhadap Ahli Parlimen perayu kerana membuat kenyataan fitnah terhadap MCA di dalam sidang media. Perayu memohon untuk membatalkan saman tersebut dengan alasan bahawa parti politik tidak boleh memfailkan tuntutan ganti rugi atas kausa tindakan fitnah. Mahkamah Tinggi menolak permohonan tersebut dengan alasan bahawa saman tersebut bukan satu tindakan yang tidak boleh dipertahankan yang boleh diketepikan secara terus. Mahkamah Rayuan ('MR') menolak rayuan perayu terhadap keputusan tersebut. Di dalam penghakiman *ex tempore*, MR berpendapat bahawa memandangkan persoalan sama ada parti politik boleh menyaman fitnah adalah belum diputuskan di Malaysia, ianya merupakan persoalan undang-undang yang serius yang patut dibicarakan pada mulanya di Mahkamah Tinggi dan bukannya di MR. Dalam keputusannya, Mahkamah Tinggi bergantung kepada keputusan Mahkamah Persekutuan di dalam *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 ('Chong Chieng Jen') yang berpendapat bahawa prinsip *Derbyshire* yang dijelaskan di dalam *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011 tidak terpakai di Malaysia. Prinsip *Derbyshire* berpendapat bahawa atas alasan kepentingan awam, akauntabiliti, ketelusan dan perlindungan hak kebebasan bersuara, pihak berkuasa tempatan atau badan kerajaan tidak boleh memfailkan tuntutan fitnah. *Chong Chieng Jen* menetapkan bahawa prinsip *Derbyshire* adalah prinsip common law di England yang tidak perlu diimport dan diterapkan di Malaysia melalui s 3 Akta

Undang-Undang Sivil 1956 kerana s 3 Akta Prosiding Kerajaan 1956 ('APK') membenarkan Kerajaan Persekutuan dan Negeri untuk menyaman mana-mana orang di dalam prosiding sivil, termasuk di dalam kausa tindakan fitnah. Mahkamah Tinggi dalam kes ini bergantung kepada *Chong Chieng Jen* kerana perayu juga merujuk dua kes lain di mana prinsip *Derbyshire* telah diperluaskan kepada parti politik dengan menghujahkan bahawa parti politik juga tidak boleh menyaman fitnah. Kedua-dua kes yang dirujuk adalah *Goldsmith & another v Bhoyrul & others* [1998] QB 459 ('Goldsmith') dan *R Rajagopal @ RR Gopal @ Nakkheeran Gopal and another v Ms J Jayalalitha and another* (2006) 2 MLJ 689 ('Rajagopal'). Malah, persoalan undang-undang di mana perayu diberi kebenaran untuk memfailkan rayuan ini adalah sama ada parti politik boleh mengekalkan saman fitnah berdasarkan keputusan di *Goldsmith* dan *Rajagopal*. Dalam rayuan ini, perayu mempersoalkan ketepatan keputusan Mahkamah Persekutuan di dalam *Chong Chieng Jen* dengan alasan bahawa mahkamah di sana bukan sahaja gagal untuk menghargai perbezaan penting antara locus standi (iaitu, hak untuk menuntut) dan kausa tindakan (iaitu, sama ada kausa tindakan dalam fitnah boleh dikekalkan), tetapi juga terlepas pandang keabsahan s 39 APK. Responden, sebaliknya, bergantung kepada *Chong Chieng Jen* dengan menghujahkan bahawa s 3 APK tidak melarang kerajaan daripada menyaman fitnah, begitu juga, tiada apa-apa dalam s 9 Akta Pertubuhan 1966 melarang parti politik, seperti responden, daripada berbuat demikian.

Diputuskan, sebulan suara membenarkan rayuan, membenarkan soalan kebenaran rayuan secara negatif, mengenepikan keputusan mahkamah sebelumnya dan menolak tindakan responden seperti yang dipohon oleh perayu:

(1) **(oleh Zaleha Yusof HMP)** Responden sebagai parti politik tidak dapat mengekalkan kausa tindakan fitnah. Sebuah parti politik tidak mempunyai reputasi yang diperlukan untuk membentuk kausa tindakan fitnah. Tiada hujah yang diberikan oleh responden untuk menunjukkan bagaimana parti politik berbanding dengan individu, syarikat atau kerajaan, mempunyai reputasi yang diperlukan yang dapat dilindungi oleh undang-undang fitnah. Hal ini adalah alasan yang mencukupi untuk menolak rayuan ini. Dalam tindakan fitnah, punca tindakan yang diperlukan bergantung kepada reputasi. Walaupun responden mempunyai keupayaan undang-undang untuk menyaman atau membawa tindakan, hal ini tidak ipso facto bermakna ianya mempunyai kedudukan untuk membawa kausa tindakan fitnah. Responden tidak mempunyai locus standi yang serius — dan tidak mempunyai kausa tindakan yang sewajarnya untuk membolehkan tuntutan ganti rugi fitnah tersebut dibawa ke mahkamah (lihat perenggan 28–29, 34 & 90).

(2) **(oleh Zaleha Yusof HMP)** Tidak seperti syarikat yang diperbadankan yang mempunyai identiti undang-undang yang berasingan dari

pemegang saham dan pengarahnya, masyarakat, seperti responden, tidak mempunyai identiti undang-undang sendiri. Sebuah syarikat mempunyai personaliti undang-undang dan bukan sahaja dapat memiliki atau memiliki harta tetapi boleh menyaman dan disaman atas namanya sendiri. Oleh itu, ianya mempunyai reputasi yang umumnya berkaitan dengan perdagangan atau perdagangannya yang boleh melindungi. Masyarakat juga bergantung pada ahlinya untuk menuntut. Sebuah masyarakat tidak bukanlah entiti undang-undang dan tidak boleh menyaman atau disaman atas namanya sendiri — lihat s 9(c) Akta Pertubuhan 1966. Oleh kerana responden tidak berasingan daripada ahli-ahlinya, ianya tidak dapat menuntut sebarang reputasi. Dalam undang-undang fitnah, ketiadaan elemen yang paling penting ini adalah mencukupi untuk menghalang tuntutan fitnah tersebut. Walaupun responden dianggap mempunyai reputasi (yang mana dinafikan), tidak dinyatakan di dalam pliding responden atau yang menjelaskan bagaimana 'reputasi' tersebut telah dimusnahkan (lihat perenggan 35–36, 39 & 86–87).

(3) **(oleh Zaleha Yusof HMP)** Tiada sebab untuk prinsip *Derbyshire* diperluaskan kepada parti politik seperti yang mana kes *Goldsmith* dan *Rajagopal*, tidak boleh diguna pakai di dalam rayuan ini. Sebuah parti politik bergantung kepada orang ramai untuk mendapatkan undi mereka untuk memerintah. Ianya tertakluk kepada pentadbiran awam. Oleh itu, adalah tidak munasabah demi kepentingan awam untuk meletakkan orang ramai dalam risiko saman fitnah dan menghalang mereka daripada menyatakan pandangan mereka atau membuat kritikan atau menyuarakan pendapat. Hal ini bertentangan dengan prinsip demokrasi. Seperti yang dijelaskan di dalam kes *Goldsmith*, terdapat justifikasi yang kukuh untuk mengenepikan hak tuntutan saman fitnah terhadap parti politik. Ahli-ahli individu sebuah parti politik mempunyai hak untuk menyaman (sekiranya dapat dibuktikan bahawa mereka telah terjejas) tetapi bergantung kepada setiap parti politik untuk 'menjawab kembali melalui pengumuman', kenyataan akhbar atau melalui media sosial (lihat perenggan 88).

(4) **(oleh Zaleha Yusof HMP)** Berdasarkan alasan di dalam kes *Goldsmith*, yang mengikut prinsip kes *Derbyshire*, responden sama ada sebagai parti politik komponen dalam kerajaan yang memerintah ketika itu atau sebagai parti politik yang berdiri sendiri, tidak mempunyai kausa tindakan untuk megekalkan saman fitnah terhadap perayu. Dalam masyarakat yang bebas dan demokratik di Malaysia, responden tidak boleh bersikap sensitif dan haruslah sentiasa terbuka kepada kritikan awam (lihat perenggan 89).

(5) **(oleh Zaleha Yusof HMP)** Kes *Chong Chieng Jen* tidak boleh diguna pakai di dalam rayuan ini kerana peruntukan Akta Prosiding Kerajaan

1956 (yang memainkan peranan penting dalam memutuskan kes tersebut) tidak terpakai kepada masyarakat, yang merupakan responden (lihat perenggan 75).

(6) **(oleh Zaleha Yusof HMP)** Rayuan ini tidak boleh digunakan sebagai platform untuk mengkaji semula keputusan Mahkamah Persekutuan dalam kes *Chong Chieng Jen*, atau untuk meneliti semula keabsahan undang-undang di dalam kes tersebut. Kebenaran tidak diberikan dalam rayuan ini untuk melihat semula persoalan undang-undang yang sama yang diputuskan dalam *Chong Chieng Jen*. Isu utama bukanlah sama ada parti politik boleh mengekalkan saman fitnah tetapi sama ada Kerajaan Negeri Sarawak mempunyai hak untuk menuntut ganti rugi atas fitnah. Di dalam rayuan ke Mahkamah Persekutuan, sebagai perkara dasar, tumpuan penghakiman mahkamah haruslah terhad kepada persoalan undang-undang yang dikemukakan kepada mahkamah. Oleh itu, mahkamah ini harus menghalang sebarang usaha untuk meneliti kembali keputusannya yang lepas supaya undang-undang tidak berada didalam keadaan yang tidak pasti secara berterusan. Sebarang keputusan mahkamah atasan tidak boleh diganggu melainkan dalam kes-kes yang paling luar biasa. Rayuan ini bukanlah kes sedemikian. Sekiranya ianya merupakan kes luar biasa, ketepatan keputusan hanya boleh dipersoalkan sekiranya terdapat isu undang-undang yang sama timbul (lihat perenggan 64).

(7) **(oleh Harmindar Singh HMP, bersetuju)** Responden sebagai parti politik tidak dapat mengekalkan tindakan untuk fitnah. Tidak dipertikaikan bahawa kes *Goldsmith* dan *Rajagopal* melanjutkan prinsip *Derbyshire* bahawa pihak berkuasa tempatan tidak mempunyai hak untuk mengekalkan tindakan untuk ganti rugi untuk fitnah, kepada parti politik. Ianya bertentangan dengan kepentingan awam sekiranya sebuah parti politik, yang pada akhirnya mungkin menjadi kerajaan sekiranya dipilih oleh rakyat, dibenarkan untuk menyaman fitnah pengundi yang telah memilihnya untuk jawatan. Hak untuk membuat saman fitnah akan menjejaskan kebebasan bersuara. Oleh itu, adalah sangat penting bagi orang ramai bahawa sebuah parti politik terbuka kepada kritikan awam untuk mendapatkan semua maklumat yang diperlukan untuk membuat keputusan yang tepat mengenai parti politik mana yang boleh mewakili kepentingan mereka. Pendekatan ini adalah munasabah kerana mana-mana pegawai dalam parti politik yang dikenal pasti dalam penerbitan berhak untuk menuntut fitnah. Selanjutnya, parti politik dengan semua sumbernya akan ditempatkan dengan baik untuk mengatasi sebarang komen yang tidak menyenangkan terhadapnya (lihat perenggan 110 & 115–117).

(8) **(oleh Harmindar Singh HMP, bersetuju)** Keputusan kes *Chong Chieng Jen* adalah penting untuk rayuan ini dan tidak boleh diabaikan kerana

sekiranya prinsip *Derbyshire* tidak diguna pakai di Malaysia (seperti yang diputuskan oleh *Chong Chieng Jen*), ianya diputuskan bahwa prinsip *Derbyshire* juga tidak boleh digunakan untuk parti politik (lihat perenggan 100).

(9) **(oleh Harmindar Singh HMP, bersetuju)** Seperti yang dihujahkan oleh perayu, keputusan *Chong Chieng Jen* dipertahankan kerana mahkamah di dalam kes tersebut telah terkhilaf untuk meneliti perbezaan penting antara kausa tindakan dan kedudukan untuk menuntut. Walaupun s 3 APK 1956 membolehkan kerajaan untuk menyaman dalam prosiding sivil, ianya tidak bermakna kerajaan mempunyai hak untuk mengekalkan tindakan dalam fitnah. Juga, hak untuk menuntut bukanlah hak mutlak. Ianya perlu dibaca bersama dengan s 39 APK seperti yang diputuskan oleh Mahkamah Rayuan dalam *Kerajaan Malaysia v Ambiga Sreenevasan & Ors* [2016] 5 MLJ 721 (lihat perenggan 107–108).

(10) **(oleh Harmindar Singh HMP, bersetuju)** Tiada alasan mengapa prinsip *Derbyshire* tidak boleh diguna pakai. Prinsip utama di *Derbyshire* adalah 'adalah menjadi kepentingan awam bahawa badan pemerintah yang dipilih secara demokratik, atau memang mana-mana badan pemerintah, harus terbuka untuk kritikan awam. Ancaman tindakan sivil untuk fitnah mempunyai kesan yang boleh menghalang kebebasan bersuara'. Amat meragukan sekiranya mana-mana kerajaan boleh mempunyai reputasi 'pentadbiran'. Kerajaan adalah wakil rakyat dan ianya akan menjadi sangat luar biasa bagi kerajaan untuk mempunyai reputasi walaupun ahli individu dalam kerajaan mempunyai hak untuk menyaman (lihat perenggan 108–109).]

Cases referred to

Abdul Rahman Talib v Seenivasagam [1965] 1 MLJ 142 (refd)
Ballina Shire Council v Ringland (1994) 33 NSWLR 680, CA (refd)
Bognor Regis Urban District Council v Campion [1972] 2 QB 169 (refd)
Chen Cheng & Anor v Central Christian Church and another appeal [1996] 1 SLR 313, CA (refd)
Chicago v Tribune Co (1923) 139 NE 86, SC (refd)
Chong Chieng Jen v Government of State of Sarawak & Anor [2019] 3 MLJ 300; [2018] 8 AMR 317, FC (distd)
Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 2) [2005] 5 MLJ 539, HC (refd)
Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor [2021] 2 MLJ 577, FC (refd)
Derbyshire County Council v Times Newspaper Ltd & Ors [1993] 1 All ER 1011, HL (folld)
Die Spoorbond v South African Railways (1946) AD 999, SC (refd)
Goldsmith & another v Bhoyrul & others [1998] QB 459 (folld)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Jameel (Mohammed) and another v Wall Street Journal Europe Sprl [2007] 1 AC 359, HL (refd)
Kerajaan Malaysia v Ambiga Sreenevasan & Ors [2016] 5 MLJ 721, CA (refd)
Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184; [2017] MLRAU 471, FC (refd)
Koperasi Rakyat Bhd v Harta Empat Sdn Bhd [2000] 3 MLJ 81, FC (refd)
Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor [1994] 3 MLJ 640, HC (refd)
Letang v Cooper [1965] 1 QB 232, CA (refd)
Lim Guan Eng v Ruslan bin Kassim and another appeal [2021] 2 MLJ 514, FC (folld)
Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun [2000] 4 MLJ 77, FC (refd)
Mak Khuin Weng v Melewangi Sdn Bhd [2016] 5 MLJ 314, CA (refd)
Manchester Corpn v Williams [1891] 1 QB 94 (refd)
Metropolitan Saloon Omnibus Co v Hawkins (1859) 4 H & N 87 (refd)
MGG Pillai v Tan Sri Vincent Tan Chee Yioun [1995] 2 MLJ 493, CA (refd)
New York Times Co v Sullivan (1964) 376 US 254, SC (refd)
Ng Yeow Song v Ketua Pengarang Guang Ming Daily & Ors [2002] 7 MLJ 357, HC (refd)
R Rajagopal @ RR Gopal @ Nakkheeran Gopal and another v Ms J Jayalalitha and another (2006) 2 MLJ 689, HC (refd)
Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee [2019] 3 MLJ 720; [2019] 3 CLJ 729, FC (refd)
Redeemer Baptist School Ltd v Glossop; Redeemer Baptist School Ltd v Fairfax Community Newspapers Pty Ltd [2006] NSWSC 1201, SC (refd)
RHB Bank Berhad v Moon Trading Sdn Bhd [2014] 5 CLJ 443, CA (refd)
Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269; [1982] 1 MLRA 143, FC (refd)
South Hetton Coal Co v North-Eastern News Association [1894] 1 QB 133, CA (refd)
Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor [2011] 1 MLJ 752; [2011] 1 CLJ 491, CA (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)
Utusan Melayu (M) Bhd v Dato Seri DiRaja Hj Adnan bin Hj Yaakob [2016] 5 MLJ 56; [2016] 5 CLJ 857, CA (refd)
Ward v Petrie 157 NY 301; 51 NE 1002, CA (refd)

Legislation referred to

Civil Law Act 1956 ss 3, 8, 8(1)
Companies Act 2016 s 20
Federal Constitution art 10, 10(2)(a)

Government Proceedings Act 1956 ss 2(2), 3, 39
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d)
Societies Act 1966 s 9, 9(c)
Societies Act 1966 [SG] s 35(b)

Appeal from: Civil Appeal No W-02(IM)(NCVC)-526-03 of 2018 (Court of Appeal, Putrajaya)

Gopal Sri Ram (with Guok Ngek Seong, Yasmeen Soh Sha-Nisse, Karluis Quek, and Leong Xin Wen) (Guok Partnership) for the appellant.
Ng Chew Hor (with Ang Boon Heng and Lim Rue Chee) (Nasaruddin, YK Chew & Partners) for the respondent.

Zaleha Yusof FCJ:

INTRODUCTION

[1] My learned sister Rohana Yusuf PCA, my learned brother Azahar Mohamed CJM, my learned sisters Hasnah Mohammed Hashim FCJ and Mary Lim Thiam Suan FCJ have read this judgment and they have expressed their agreement on the conclusion and the reasons set out in this judgment. My learned brother Harmindar Singh Dhaliwal FCJ and my learned sister Nallini Pathmanathan FCJ agreed with the conclusion of this judgment but on different reasons.

[2] The appellant had filed an application under O 18 r 19(1)(a) or (b), (c) and/or (d) of the Rules of Court 2012, to strike out the respondent's claim in a writ of summons and statement of claim filed on 17 July 2017 (the said action) at the High Court of Kuala Lumpur for alleged tort of defamation, on the ground that the respondent, being a political party, had no locus standi to file a defamation suit.

[3] The application was dismissed by the High Court with costs on 27 February 2018 and on appeal, the decision of the High Court was affirmed by the Court of Appeal on 11 July 2019.

[4] On 12 March 2020, this court had granted the appellant leave to appeal on the following sole question of law:

> Whether a political party can maintain a suit for defamation having regard to the decisions in *Goldsmith & Another v Bhoyrul & Others* [1998] QB 459 and *Rajagopal v Jayalalitha* [2006] 2 MLJ 689.

A BRIEF FACTS

[5] The appellant was a member of Parliament for Segambut Constituency. Currently, he is a member of Parliament for the Constituency of Kepong.

B **[6]** The respondent is a public officer of a society registered as Malaysia Chinese Association (MCA) under the Societies Act 1966 (Act 335). MCA is a political society and a component party to the then ruling Federal Government of Malaysia.

C **[7]** Subsection 9(c) of Act 335, inter alia, provides:

> a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose ...

D **[8]** Hence, being the public officer of MCA, the respondent had filed an action against the appellant for an alleged defamatory statement issued by the appellant at a press conference held at the corridor of Parliament on or about 15 March 2017.

E **[9]** The alleged defamatory words were:

(i) Jadi saya minta parti MCA mengumumkan secara awam aset yang dimiliki oleh Parti MCA: FD, wang tunai, fixed asset, syer dan sebagainya. Secara umum, berapa aset yang dimiliki oleh MCA. Dan saya mengaitkan aset parti itu dengan peruntukan kerajaan kepada sekolah Cina. Saya nak juga MCA mengumumkan daripada jumlah aset yang dimiliki oleh MCA, berapa dari jumlah itu pernah diberikan kepada sekolah Cina ... tiap-tiap tahun ...

F

G (ii) ... Informasi yang saya dapat, tidak pernah sekali pun MCA ambil dari poket parti sendiri untuk memberi kepada sekolah Cina I mean, dalam bentuk peruntukan. Semua yag dia dapat daripada donation awam, daripada kerajaan, dia masuk poket MCA sendiri. Masuk sahaja, tak pernah keluar.

H **[10]** The appellant filed his defence at the High Court and thereafter, as alluded to before, filed the application in encl 6 to strike out the respondent's claim.

I **[11]** The learned High Court judge relied on the decision of this court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2018] 8 AMR 317 which rejected the principle in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011. In *Derbyshire*, it was, inter alia, held that a local authority and a local government body could not sue for defamation. As

such, the learned High Court judge dismissed the appellant's application as His Lordship was of the view that the appellant had failed to show that the respondent's claim was obviously unsustainable.

[12] The appellant appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal dismissed the appellant's appeal. The grounds of judgment of the Court of Appeal are not available. However, according to its *ex tempore* grounds as recorded in the CMS notes of proceedings dated 11 July 2020, the Court of Appeal opined that 'the question of whether a political party can sue in defamation is a substantial question of law but it has yet to be decided in Malaysia. It is not appropriate for this court sitting as the appellate court to make any pronouncement on this question as we are not a court of first instance. There is serious issue of law to be tried and the matter should proceed to trial. So the order of the High Court is affirmed. The appeal is dismissed with costs'.

[13] Hence, the appeal before us.

THE APPELLANT'S SUBMISSIONS

[14] Learned counsel for the appellant submitted that the tort of defamation is a creature of the common law. Tort of defamation exists to protect the reputation of natural and artificial persons ie a company; but in the case of a company, it is limited to suing for defamation only of its commercial reputation and not for its general reputation (see *South Hetton Coal Co v North-Eastern News Association* [1894] 1 QB 133). However, a society does not by itself have a separate existence. It is only through representation by its members, just like the government. The government does not have a reputation as it is representative of people, so does a society.

[15] Learned counsel also referred to s 8 of the Civil Law Act 1956 (Act 67) which he contended enforces the common law position. Section 8 provides that defamation cannot survive on the death of a person which means it must attach to the person.

[16] Further, there is a difference between locus standi as oppose to cause of action. Section 9 of Act 335 only gives the respondent the right to sue but does not mean that it has the requisite cause of action to initiate and sustain a suit in court. He referred to the Court of Appeal of New York case of *Ward v Petrie* 157 NY 301; 51 NE 1002to support his contention.

[17] He further submitted that the case of *Chong Chieng Jen*, which was relied upon by the respondent was wrongly decided as defamation applies to an

A individual and dies upon his death, hence the government has no cause of action in defamation.

[18] The cases on point according to learned counsel are *Goldsmith*, and *Rajagopal*. These cases had extended the principle expounded in *Derbyshire*, that a local authority did not have the right to maintain an action for damages for defamation, to political parties.

[19] Further, to restrict criticism against any political parties or even the government is against freedom of speech, as guaranteed under art 10 of the Federal Constitution.

THE RESPONDENT'S SUBMISSIONS

[20] Learned counsel for the respondent relied solely on the case of *Chong Chieng Jen*. As in the case of *Chong Chieng Jen* wherein it was decided that s 3 of the Government Proceedings Act 1956 (Act 359) did not prohibit the government from suing for defamation; likewise s 9 of Act 335. Subsection 9(c) is said to not restrict a society like the respondent from suing for defamation. In Malaysia, freedom of speech is not absolute but is subject to the law of defamation.

[21] To further support his contention that a political party has a reputation that needs to be protected, learned counsel for the respondent referred to a High Court decision by Azhar Maah J (as he then was) in *Ng Yeow Song v Ketua Pengarang Guang Ming Daily & Ors* [2002] 7 MLJ 357. In that case, the plaintiff was a society registered as the Dewan Perniagaan dan Perindustrian Tiong Hua Johor Bharu. The plaintiff had through its public officer sued the defendant for defamation. The learned High Court judge held that a society has a name and reputation and that there is no provision restricting or limiting the category or type of action a society can pursue; which includes defamation.

OUR DECISION

[22] We had perused the records of appeal and considered the submissions of the parties, written as well as oral. The issue that the parties sought this court to decide might not be a novel issue in other jurisdictions, but it is still quite unsettled in ours.

[23] What amounts to defamation or a defamatory statement is a question of fact. It has been explained time and again by our courts. Among the recent decisions is one by this court in *Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Nurul Izzah bt Anwar & Anor* [2021] 2 MLJ 577, FC wherein Harmindar Singh Dhaliwal FCJ in para 19 of His Lordship's judgment had quoted some

authorities and concluded, inter alia, an imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of the community, to hatred, ridicule or contempt or to lower him or her in their estimation or to cause him or her to be shunned and avoided by them. His Lordship once again in the recent decision of *Lim Guan Eng v Ruslan bin Kassim and another appeal* [2021] 2 MLJ 514 succinctly reiterated the critical elements of defamation at paras 28 to 30 of the judgment. We endorse those views and in addition cite the helpful comments of K Kuldeep Singh in *The Tort of Defamation, Concepts and Cases on Libel and Slander in Malaysia and Singapore* (2nd Ed, Lexis Nexis) p 1, para 1.1.1 as follows:

> The defamation laws in Malaysia and Singapore do not define the term defamation. Instead from key words found in statute and subsequent case laws we can formulate what the term means.
>
> The defamation law uses key terms such as 'Words spoken and published which impute ...', 'word calculated to disparage the plaintiff, 'calculated to cause pecuniary damage to the plaintiff;
>
> 'materially injure the plaintiff's reputation'. These terms suggest that the plaintiff has been injured or set to be in a loss state in his reputation as a consequence of the defamatory statement.
>
> Generally, a person is said to be defamed when a defamatory statement, amounts into a publication, where such a statement is untrue and was calculated to injure his or her reputation and thereby exposing him to hatred, contempt or ridicule. The injury that occurs upon the defamed person is known as 'verbal injury' to his reputation.
>
> The law recognises in every man a right to have the estimation in which he stands in the opinion of others to be unaffected by false statements to his discredit.
>
> A key question to be asked is 'Do the words tend to lower the Plaintiff in the estimation of right-thinking members of society generally?' The words should not be regarded as defamatory unless they involve some lowering of the plaintiff's reputation or of the respect with which he is regarded. They must be disparaging of him. They must 'injure' the reputation or is likely to affect a person adversely in the estimation of reasonable people generally. The standard to be applied when determining if the injury was significant must be done after it is viewed through the eyes and ears of right thinking members of society (otherwise known as the hypothetical reasonable reader).

[24] We are not going to labor on whether the alleged defamatory words are indeed defamatory. That is not an issue before us. The issue is whether a political party like MCA can maintain a suit for defamation.

[25] This issue challenges the locus standi of the respondent to sue for damages for defamation.

A *Locus standi*

[26] At the heart of the present appeal lies a fundamental question: whether the respondent, being a political party has a cause of action in an action for defamation. In our view, the respondent does not have a reputation for which it may maintain an action for damages for defamation. If one turns to the case authorities and look at the matter as a question of principle, the following principles of law are well settled.

[27] First, an individual's name and reputation are inherent to their rights of a dignified life (see *Abdul Rahman Talib v Seenivasagam* [1965] 1 MLJ 142 and *MGG Pillai v Tan Sri Vincent Tan Chee Yioun* [1995] 2 MLJ 493). A corporation's trading reputation is important for its commercial operations and business opportunities (see *South Hetton Coal Company Ltd*, *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2007] 1 AC 359 and *Mak Khuin Weng v Melewangi Sdn Bhd* [2016] 5 MLJ 314 (CA)). A government's governing reputation is important to be protected for the maintenance of public trust and the general good of inter-governmental relations and economic benefits (see *Chong Chieng Jen*).

[28] No arguments were advanced by the respondent on how a political party, as opposed to an individual, a corporation and a government, has the requisite reputation which the law of defamation is intended to protect. This, in itself, is a sufficient ground to dispose this appeal. A political party has no requisite reputation to constitute cause of action for defamation. This is borne out when we compare the status of the respondent with say, a company.

[29] Although the respondent may have the legal capacity to sue or to bring an action, that does not ipso facto mean that there is standing to bring an action for defamation. It is locus standi in this sense that we find the respondent seriously lacks, that it does not have the necessary cause of action as it does not have a reputation for and over which it may go to court to sue to protect.

[30] By and large, a cause of action means a factual situation, the existence of which gives rise to an enforceable claim and entitles one party to obtain from the court a remedy against another party.

[31] In *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, the Supreme Court, after citing Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 which defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person', was of the view that the factual situation spoken of by Lord Diplock in defining 'a cause of action' must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and

that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

[32] In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, the Court of Appeal cited Stroud's *Judicial Dictionary* (5th Ed) at p 378 and defined a 'cause of action' as 'the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment'.

[33] On the other hand, 'locus standi' is literally a place of standing. In *Lee Freddie & Ors v Majlis Perbandaran Petaling Jaya & Anor* [1994] 3 MLJ 640, it was held that in the legal arena, locus standi has become a place to stand in court, or a right to appear in a court of justice on a given question. That right is given to a person if he is suing to enforce some public right provided the interference with that public right causes direct damage to him. To avoid a situation of asking which came first, the chicken or the egg, one has to determine first whether the right or legitimate expectation arises. A denial of locus standi will only follow where such existence is first negative.

[34] In the context of a defamation action, the requisite cause of action hinges upon reputation. The development of the law of defamation in acknowledging natural and artificial persons having requisite reputation to maintain a defamation action is trite and settled (see generally *Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee* [2019] 3 MLJ 720; [2019] 3 CLJ 729 (FC); *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752; [2011] 1 CLJ 491 (CA) para 36; *RHB Bank Berhad v Moon Trading Sdn Bhd* [2014] 5 CLJ 443 (CA) paras 57–59; *Lim Guan Eng*.

[35] Unlike incorporated bodies or companies which have separate legal identities from its shareholders and its directors, the respondent, a society does not. This is evident when we compare s 20 of the Companies Act 2016 (Act 777) with s 9(c) of the Societies Act (Act 335):

> 20 A company incorporated under this Act is a body corporate and shall —
>
> (a) have legal personality separate from that of its members; and
>
> (b) continue in existence until it is removed from the register
>
> 9 The following provisions shall apply to registered societies —
>
> (a) the movable property of a society, ...;
>
> (b) the immovable property of a society ...;
>
> (c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be

A competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society.

B **[36]** A company has legal personality and is not only able to possess or own property but more importantly, to sue and be sued in its own name. It therefore has a reputation generally related to its trade or commerce for which it may sue to protect, while a society is dependent on its members even to sue. A society is not, on its own, a legal entity and cannot even sue or be sued in its own name. This is clearly stated under sub-s 9(c) of the Societies Act of Act 335.

C **[37]** There is similar opinion in *Gatley on Libel and Slander* (11th Ed, Sweet & Maxwell) at p 251 para 8.28:

> Where members of an unincorporated group publish a libel each one who authorized or participated in it is personally liable in the normal way. Where the
D members of such a group are defamed, each has his own action if sufficiently identified by the libel. An action for libel will not lie against an unincorporated association or body of persons in its collective name, for as an entity it can neither publish nor authorize the publication of a libel. Nor can it sue, for it lacks sufficient personality.

E **[38]** We understand that in the Singapore Court of Appeal decision of *Chen Cheng & Anor v Central Christian Church and another appeal* [1996] 1 SLR 313, an unincorporated association registered under its Societies Act (Ch 311) has sufficient personality to sue and be sued for defamation. That is because
F s 35(b) of its Societies Act provides that every such society may sue or be sued in the name in which it is registered. In clear contrast, our s 9(c) of Act 335 provides for that right through the members or office-bearers of the society.

G **[39]** Since the respondent has no existence separate from its members, it cannot assert or claim any reputation. In the law of defamation, the absence of this most essential element is sufficient to bar the claim from proceeding any further.

H **[40]** Related to this is the issue of s 8 of the Civil Law Act 1956 (Act 67). Learned counsel for the appellant argued that on the basis of the provision of s 8(1), the cause of action in defamation applies to an individual and dies or abates upon his death, hence a political party has no cause of action in defamation. This contention is not free from difficulties. There are several
I reasons for this.

[41] Section 8(1) of Act 67 provides:

> 8 Effect of death on certain causes of action

(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

[42] The legislative background and scope of Act 67 was aptly explained by Salleh Abbas FCJ (as His Lordship then was) in *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 at p 270; [1982] 1 MLRA 143 (FC) at pp 144–145; and was cited and further elaborated in the majority decision delivered by Zaharah Ibrahim FCJ (as Her Ladyship then was) in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184; [2017] MLRAU 471 (FC). As is clear from the wordings of the provision, s 8(1) of Act 67 provides for the effect of death on certain causes of action. The provision relates to what is known as the 'estate claim' where all causes of action, save and except for those which are prohibited therein, vested in the deceased prior to his death, shall survive to the personal representatives of the estate (see *Malaysian Civil Procedure 2021* (Vol 11) at para E/8/1, p 1071).

[43] Pursuant to this provision, upon the death of a person, all causes of action subsisting or vested in him survive against or for the benefit of his estate except for certain causes of action, that is to say, defamation, seduction and inducement of one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery. In other words, the cause of action in defamation does not survive upon the death of a person, *actio personalis moritur cum persona* (see *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Ors (No 2)* [2005] 5 MLJ 539).

[44] In *Dato' Seri S Samy Vellu*, the High Court was asked to decide whether the various causes of action in the plaintiff's claim abated following the second defendant's death — a natural person. The various causes of action being — (i) damages for the tort of conspiracy; (ii) damages for the tort of malicious falsehood; and (iii) damages for the tort of libel. The High Court found that the only action for damages for the tort of malicious falsehood survived while the tort of conspiracy merged with the tort of libel, and both causes of action abated upon the death of the second defendant. The following was the reasoning of Abdul Malek Ishak J (as he then was):

[30] The law is this. That the cause of action for the tort of libel must abate by virtue of s 8(1) of the Civil Law Act 1956 which enacts as follows:

8 Effect of death on certain causes of action

A (1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other
B or to any claim for damages on the ground of adultery.

[31] Now, s 8 of the Civil Law Act 1956 applies the general rule of *actia personalis moritur cum persona*. It simply means this. That no action can be commenced against the estate of a deceased defamer and if the defendant dies before the verdict is handed down, the action abates. This fair minded rule does not affect other claims
C against other persons who are said to be liable in the action such as the first defendant here (see *Gatley On Libel And Slander* (10th Ed) at p 205). It can safely be surmised that an action for libel is clearly captured by the provision to s 8(1) of the Civil Law Act 1956 thereby excluding the general application of that section to the tort of defamation.

D [32] A personal action dies with the person when the person dies. This is what has happened to the deceased second defendant. Osborn's *Concise Law Dictionary* (7th Ed) by Roger Bird defines the rule *actio personalis moritur cum persona* in this way:

Actio personalis moritur cum persona. (A personal action dies with the person). No executor or administrator could sue or be sued for any tort committed against, or
E by, the deceased in his lifetime (except injuries to property); the right of action in tort was regarded originally as purely punitive and only later as compensatory. The rule is now confined to causes of action for defamation (Law Reform (Miscellaneous Provisions) Act 1934, s 1(1), as amended). Exemplary damages are not recoverable (section 1(2), as amended)

F [33] *Halsbury's Laws of England* (4th Ed Vol 28) at p 116 carries this passage:

227 Abatement of action on death of parties. On the death of either party to an action of libel of slander, the action abates even where special damage has accrued to the estate of the plaintiff (*Chamberlain v Williamson* (1814) 2 M&S 408 at p 415; *Pulling v Great Eastern Rly Co* [1882] 9 QBD 110). However,
G there is no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment; and judgment may be given in such a case notwithstanding the death.

[34] The head notes to the case of *Brown v Feeney* [1906] 1 KB 563 also merits
H reproduction. There it states as follows:

The action was for libel. The defendant had paid into court, by way of satisfaction, without denying liability, a sum of 150. The plaintiff did not take the money out of court. After the close of the pleadings, the action being yet untried, the defendant died, and the action therefore abated. The defendant's
I executors applied at chambers for an order for payment out to them of the money paid in as aforesaid. The master refused the application, and on appeal the learned judge affirmed his decision. The summons appeared to have been headed as issued in the action, which had abated, but it was agreed between the parties that no objection should be raised by reason of any technical difficulty arising from the form of the application, but that the court should be asked to

decide as on an originating summons to whom the money should be paid out. A

[35] The sum total of it all would be this. That the cause of action for libel must abate with the death of the second defendant.

[45] As can be seen from the above, the High Court reiterated the principle of *actio personalis moritur cum persona* by citing the proviso to s 8(1) of Act 67. B

[46] At this juncture, it would be appropriate to provide a summary of the principle of law that deals with the effect of death on certain causes of action as encapsulated in s 8(1) of Act 67. It is now settled that an action survives on death of a person except for causes of action for defamation. Upon death of a person, a cause of action on defamation abates. Defamation action does not lie on behalf of, or against, a dead person. A defamation action, including for the benefit of the estate, does not survive the death of a person. It does not, however, follow, as suggested by learned counsel for the appellant that a cause of action for defamation applies only to individual persons and abates upon their death. All of which leads us to conclude that s 8(1) of Act 67 is irrelevant to the discussion of whether a non-natural person such as a political party, has the locus standi and cause of action to constitute and maintain a defamation action. C D E

[47] This brings me to deliberate further on why we say that political parties do not have the requisite reputation to complain of in the law of defamation. For this, we propose to carefully examine each of the four main cases relied on by the parties as well as several other relevant case law. F

[48] First, the case of *Derbyshire*. The plaintiff in that case was a local authority and the defendants were a publisher of a newspaper, its editor and two journalists. The plaintiff sued the defendants for damages for publishing an article which the plaintiff claimed to be defamatory of the plaintiff. The article questioned the propriety of certain investments made by the plaintiff in its superannuation fund. Similar to the appeal before us, the defendants in *Derbyshire*, applied to have the action struck out as disclosing no cause of action against them on grounds, inter alia, that a local authority, could not maintain an action for libel. The first instance judge dismissed the defendants' application and held that a local authority could sue for libel in respect of its governing or administrative reputation. The defendants appealed to the Court of Appeal and the Court of Appeal allowed the appeal principally on the ground that a local authority could not sue for libel in respect of its governing or administrative reputation as such action would stifle legitimate public criticism of its activities. The local authority appealed to the House of Lords. G H I

[49] The House of Lords dismissed the appeal and in agreeing with the Court of Appeal held that under 'the common law of England, a local authority does not have the right to maintain an action for damages for defamation' as it would be contrary to public interest for the institutions of government, whether central or local, to have that right. Not only was there no public interest favouring the right of government organs to sue for libel, it was of the highest public importance that a governmental body should be open to uninhibited public criticism, and a right to sue for defamation would place an undesirable fetter on the freedom of speech. This decision of the House of Lords which denied governmental body an entitlement or right to sue for defamation is generally referred to as 'the *Derbyshire* principle'.

[50] In coming to its decision, the House of Lords noted that till that date (1993), there were only two reported cases in which an English local authority had sued for libel: *Manchester Corpn v Williams* [1891] 1 QB 94 and *Bognor Regis Urban District Council v Campion* [1972] 2 QB 169. Both decisions reached different conclusions on the issue of whether such bodies were entitled to sue for defamation.

[51] In *Manchester Corpn*, the defendant had written to a local newspaper alleging that 'in the case of two, if not three, departments of our Manchester City Council, bribery and corruption have existed, and done their nefarious work'. In response to the question of whether a local council, though a corporation could maintain an action for libel, the divisional court held that the statement of claim disclosed no cause of action. Day J explained:

> This is an action brought by a municipal corporation to recover damages for what is alleged to be a libel on the corporation itself, as distinguished from its individual members or officials. The libel complained of consists of a charge of bribery and corruption. The question is whether such an action will lie. I think it will not. *It is altogether unprecedented, and there is no principle on which it could be founded*. The limits of a corporation's right of action for libel are those suggested by Pollock CB in the case which has been referred to. A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class. There must, therefore, be judgment for the defendant. (Emphasis added.)

[52] Pollock CB had held in *Metropolitan Saloon Omnibus Co v Hawkins* (1859) 4 H & N 87, that corporations, at common law, can sue in respect of a libel. According to His Lordship, 'it would be monstrous if a corporation could maintain no action for slander of title through which they had lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it cannot commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong; and if its property

is injured by slander it has no means of redress except by action. Therefore, it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured'.

[53] As for the decision in *Bognor Regis*, Browne J had allowed the defamation action of the local council, likening the council to companies who have a reputation to protect. In his words, 'just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government corporation have a 'governing reputation' which they are equally entitled to protect in the same way — of course, bearing in mind the vital distinction between defamation of the corporation as such and defamation of its individual officers or members'. However, His Lordship accepted the statement in *Gatley on Libel and Slander* that 'a corporation or company cannot maintain an action for libel or slander for any words which reflect, not upon itself, but solely upon its individual officers or members'. Be that as it may, His Lordship was disinclined to follow *Manchester Corpn* taking the view that the 'statement of law' propounded by Day J 'is unsound in principle and would not be upheld in the Court of Appeal'.

[54] Lord Keith speaking unanimously for the House of Lords in *Derbyshire* declined to follow *Bognor Regis*, choosing instead to adopt the approach taken by the Supreme Court of Illinois in *Chicago v Tribune Co* (1923) 139 NE 86 as endorsed in *New York Times Co v Sullivan* (1964) 376 US 254, that a city could not maintain an action for damages for libel due to public interest considerations. In fact, the House of Lords went on to hold that *Bognor Regis* 'was wrongly decided and should be overruled'.

[55] According to Lord Keith, Browne J had failed to give any consideration to the question of whether a local authority, or any other body exercising governmental functions, might not be in a special position as regards the right to take proceedings for defamation. While defamatory remarks may impair say a charity's ability to carry out its objects, or a union to keep its members or attract new members, or even the efficiency of the local authorities from carrying out its functions, there are nevertheless 'features of a local authority which may be regarded as distinguishing it from other types of corporations, whether trading or non-trading. The most important of these features is that it is a governmental body, ... a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech'. The House of Lords was concerned

with the 'chilling effect' induced by the threat of litigation for libel thus preventing the publication of the very matters which are desirable to make public.

[56] The House of Lords found further support for its view from the decision of *Die Spoorbond v South African Railways* (1946) AD 999. The Supreme Court of South Africa similarly held that a governmental department of the Union of South Africa was not entitled to maintain an action for defamation in respect of a publication said to have injured its reputation as the authority responsible for running the railways. The Supreme Court of South Africa opined that 'considerations of fairness and convenience are, on balance, distinctly against the recognition of a right in the Crown to sue the subject in a defamation action to protect ... reputation'. The court held that there was sufficient sanctions available to the state and to the individual officers to deal with any injurious falsehood or defamatory utterances and that it would be a serious interference with free expression of opinion if the wealth of the state, derived from the subjects, could be used to launch actions for defamation against those subjects who are said to have falsely and unfairly criticised or condemned the management of the country.

[57] Although the above observations of the Supreme Court of South Africa were made in the context of a government department, the House of Lords was of the view that such observations may be no less applicable to local authorities. Worse, where in the case of local authorities who are only temporarily under the control of one political party or another such that 'it is difficult to say that the local authority ... has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change'.

[58] Next, is the case of *Goldsmith*. This is one of two cases upon which the sole question of law is formulated. *Goldsmith* had not only applied and followed the principle laid down by *Derbyshire* but extended it to political parties. In *Goldsmith*, the first plaintiff was a businessman and founder of the second plaintiff, a company limited by guarantee but operated as a political party. The first and second defendants were journalists employed by the third defendant, a newspaper company. The plaintiffs brought an action for defamation against the defendants in respect of a newspaper article which the plaintiffs claimed insinuated that the plaintiffs had lied to the electorate.

[59] The defendants in *Goldsmith*, applied to strike out the second plaintiff's claim on the ground that a political party could not sue in defamation. Buckley J in his judgment found no reason not to apply the principle enunciated in *Derbyshire*, to cover a political party. His Lordship allowed the defendants' application to strike out the second plaintiff's claim and held that,

the principle that in a free and democratic society, it was contrary to the public interest to permit those who hold office in government or were responsible for public administration to sue in defamation applied equally to a political party putting itself forward for office or to govern. Recognising that any reliance on the ground of public interest to prevent a right of action for defamation 'requires great caution', His Lordship proceeded to hold that the public interest in free speech and criticism is sufficiently strong to justify withholding the right to sue to such political parties. Any individual affected by such criticism always retains a right to sue while the political party can always answer back through public announcements.

[60] The third case is the Indian High Court case of *Rajagopal*, the case in the question of law posed before us. This was an appeal against a decision of a single judge. The appellant was the editor and publisher of a bi-weekly magazine called 'Nakkheeran'. The second appellant was the associate editor of Nakkheeran. The respondent was the Chief Minister of the State of Tamil Nadu and also the General Secretary of All India Anna Dravida Munnetra Kazhagam, a political party. The second respondent was a close friend of the first respondent and was interested in the welfare of the first respondent. The respondents filed a suit against the appellants seeking an injunction and damages for publishing defamatory articles about them and restraining the appellants from publishing in future matters of defamatory nature without prior permission of the respondents. The trial court granted a limited interim injunction restraining the appellants from publishing about the private life of the first respondent without prior verification. The appellants appealed and the appeal was allowed and the order of injunction granted by the learned single judge was vacated. AP Shah CJ, in delivering the judgment on the appeal considered many authorities including *Derbyshire* and came to the following conclusion:

> 23 Thus law is well settled that so far as Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them. In the case of public officials, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties and this is so even where the publication is based upon the facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth ...
>
> 29 The fundamental right of freedom of speech is involved in these proceedings and not merely the right of liberty of the press. If this action can be maintained against a newspaper, it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of the Government. In a free democratic society those who hold office in Government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. As observed in *Kartar Singh*'s case the persons

A holding public offices must not be thin-skinned with reference to the comments made on them and even where they know that the observations are undeserved and unjust, they must bear with them and submit to be misunderstood for a time. At times public figures have to ignore vulgar criticisms and abuses hurled against them and they must restrain themselves from giving importance to the same by
B prosecuting the person responsible for the same ...

[61] His Lordship further opined that freedom of speech and expression of opinion were of 'paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and Governments
C and must be preserved'. In short, while what a person holding public office does within the four walls of his house does not totally remain a private matter, public gaze cannot be avoided as it is a 'necessary corollary of their holding public offices'. His Lordship however added that public scrutiny of such persons should not reach a 'stage of harassment'.
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[62] The fourth case is the decision of this apex court in *Chong Chieng Jen*. This is the case which the respondent primarily relied on.

E **[63]** Learned counsel for the appellant had urged this court to hold that our decision in *Chong Chieng Jen*, was wrongly decided and hence the government has no cause of action in defamation. A few fundamental points can be made to dismiss this argument.

F **[64]** It is necessary to point out that the case of *Chong Chieng Jen* is not the subject of the question of law posed to this court. The reason for this is that unlike the present case, the central issue in *Chong Chieng Jen* was not whether a political party can maintain a suit for defamation. In *Chong Chieng Jen*, we were primarily required to decide whether the state government had a right to
G sue for damages for defamation. Now, in an appeal to the Federal Court, as a matter of policy, the focus of our judgment must be confined to the question of law posed to the court. Another point to emphasise is that the present appeal should not be used as a platform to revisit the Federal Court's decision in *Chong Chieng Jen* nor to re-litigate the correctness of the approach taken in that
H decision. The appellant cannot be allowed to use the present appeal as a backdoor approach to circumvent the settled law decided by the Federal Court in *Chong Chieng Jen*. Leave was not granted to revisit the same question of law which had been decided in *Chong Chieng Jen*. This court should exercise judicial restraint from reopening and overruling its recent decisions
I unnecessarily. Any decision of this apex court should not be disturbed unless in the most exceptional cases. In the present appeal there is none. We should remind ourselves that if at all, its correctness may only be questioned where an identical point of law arises for decision. There can be no doubt that it is permissible for judges to see things in wholly different ways. But we should be

very slow to entertain a request to revisit or depart from our earlier decision. It would be unfortunate if the law is in a constant state of flux and create uncertainty. To explain this point further, we refer to our decision in *Koperasi Rakyat Bhd v Harta Empat Sdn Bhd* [2000] 3 MLJ 81 (FC) at p 88 paras D-E where Gopal Sri Ram JCA said:

> In the instant appeal a further attempt has been made by the plaintiff to resurrect the decision in *Che Wan Development* and to reverse *Feyen No 1*. In my judgment, this attempt must fail for two reasons. First, I do not think, as a matter of policy, it is open to us to reverse a decision of another division of this court given so recently. Great care must be taken especially in a case as the present which concerns the interpretation of a statutory provision. It should not be done save in the most exceptional of cases. Otherwise it would lead to uncertainty.

[65] The matter is further exacerbated when learned counsel for the appellant erroneously argued that *Chong Chieng Jen*, was not good law because the Federal Court failed to appreciate the distinction between locus standi and a cause of action. That is just not right and is another misplaced contention. What is wrong here is that one cannot take a sweeping position without carefully reading and understand the judgment of this court. A judgment of any court must be read in its totality and not pick one sentence or para and characterise it out of context. This requires a little explanation.

[66] In *Chong Chieng Jen*, the respondent, the State Government of Sarawak had filed a claim for defamation against the appellant who was a state assemblyman and an opposition member of Parliament over a statement made by the appellant and published by the media, that mismanagement of the state's financial affairs had resulted in the 'disappearance' of RM11 billion in public funds. The issue before this court was whether a state government or a department or organ of that department (the respondent) had the right to sue the appellant for defamation. This court declined to apply the common law principle expounded in *Derbyshire* and held, inter alia, that the right of government to sue in civil proceedings under s 3 of Act 359 including for defamation, was not subject to the common law in England.

[67] This is borne out in the following parts of the decision as delivered by Ahmad Maarop PCA (as he then was):

> [35] In Malaysia the right of the federal government and the government of the states to sue is a statutory right. It is specifically provided by Act 359. According to the long title to the Act, it is an Act relating to proceedings by and against the federal government and the government of the states. The right of the government (and specifically in the context of the present appeal, the right of the State of Sarawak) to sue is provided by s 3 of Act 359. Section 3 of that Act provides:
>
> > 3 Subject to this Act and of any written law where the Government has a claim against any person which would, if such claim had arisen between subject and

A subject, afford ground of civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.

[36] Under s 3 of the Interpretation Acts 1948 and 1967 (Act 388), the words 'written law' means:

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(a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;

(b) Acts of Parliament and subsidiary legislation made thereunder;

C (c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and

(d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made D thereunder) which are in force in Malaysia or any part thereof.

[37] The aforesaid definition of 'written law' does not include 'common law' which under Act 388 means 'the common law of England'. Thus, the statutory right of the government to sue in civil proceedings under s 3 of Act 359 including for defamation is not subject to the common law of England.

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[68] The Federal Court further held that Act 359 did not preclude the government from taking civil action for defamation. Indeed, it said, sub-s 2(2) of that Act, which defined 'Government' to include the federal government F and the state governments, provided a wide definition of 'civil proceedings' to include any proceeding whatsoever of a civil nature before a court:

[38] Act 359 does not preclude the government from taking civil action for defamation. Indeed, s 2(2) of Act 359 which defines 'government' to include the federal government and the government of the states, also provides a wide definition G of 'civil proceedings':

'civil proceedings' means any proceeding whatsoever of a civil nature before a court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, but does not include proceedings under Chapter VIII of the Specific Relief Act 1950 [Act 137], or such proceedings as H would in England be brought on the Crown side of the Queen's Bench Division;

According to the majority of the Court of Appeal:

The term 'civil proceedings' used in s 3 is defined by s 2(2) to mean 'any proceeding whatsoever of a civil nature before a court' and the operative words in I s 3 are 'which would, if such claim had arisen between subject and subject, afford ground for civil proceedings', meaning to say if a claim affords ground for civil proceedings between private individuals, it will afford ground for civil proceedings between the government and private individuals. Thus, if a claim affords ground for an action in defamation (which is a form of civil action) between private individuals, it will afford ground for an action in defamation

between the government and private individuals. That in our view is the proper construction to be given to s 3 of the Government Proceedings Act and will not in any way result in an absurdity or be in breach of any canon of statutory interpretation.

[39] We agree. Under s 3 of Act 359, if an individual makes an allegation critical of a government, which allegation if made against another individual would afford ground for that other individual to sue, then the government may sue in defamation. We also agree that there is nothing under s 3, indeed under Act 359 which could be construed to prohibit or restrict the government from suing in defamation.

[69] More importantly, the Federal Court in *Chong Chieng Jen* did not overlook that locus standi alone was not enough, and that a plaintiff must also possess a cause of action which gives rise to an enforceable claim. This is made explicit in the following paras of the judgment of this court in *Chong Chieng Jen*:

[40] In his submission learned counsel for the defendant submitted that the government or government bodies, being the democratically elected bodies has no 'governing reputation'. In support he cited *Gatley on Libel and Slander* (10th Ed) para 8.20, where the learned author stated that 'the former view that a local government corporation had a 'governing reputation' which was protected by the law of defamation no longer represents English law'. According to the learned counsel, the view that the government had a 'governing reputation' to protect was originally pronounced in *Bognor Regis Urban District Council v Campion* [1972] 2 All ER 61; [1972] 2 QB 169, but it has been overruled by the House of Lords in *Derbyshire*, which stated that *Bognor Regis* was wrongly decided.

[41] Learned counsel only referred to the first sentence in para 8.20 of *Gatley on Libel and Slander* (10th Ed); not the whole para. It is necessary therefore, to consider that sentence in its proper context. To do this, it is crucial to consider the whole of para 8.20 of that book which appears at p 212 which is as follows:

8.20 Governmental bodies. The former view that a local government corporation had a 'governing' reputation which was protected by the law of defamation no longer represents English law. In *Derbyshire County Council v Times Newspapers* the House of Lords held that at common law, and without reference to the guarantee of freedom of expression in art 10 of the European Convention on Human Rights, an organ of local government may not bring an action for defamation. This rests not upon any absence of likely damage to such a body, for in many cases the considerations which apply to a trading or charitable corporation may also apply to a government body, but upon the likely chilling effect on free speech of granting a right of action. Though the case concerned a local authority the same rule applies to an organ of central government: neither the Crown nor a government department which has corporate status may sue for defamation. It 'would be a serious interference with the free expression of opinion hitherto enjoyed ... if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be,

criticised or condemned the management of the country'. The question in the *Derbyshire* case was said to be whether the authority was entitled to maintain an action for words which reflected on its 'governmental and administrative functions' and its operation of its pension fund, to which the alleged libel related, was clearly thought to fall within that, but it is submitted that the same rule applies even where the activity referred to could properly be described as trading.

[42] Paragraph 8.20 does not support the submission made by learned counsel. That para captures the essence of the *Derbyshire* principle. It is clear that in *Derbyshire* the House of Lords decided that local government corporation could not sue for defamation (overruling *Bognor Regis*) not because it held that government corporation had no 'governing reputation' but because of the likely chilling effect on freedom of speech of granting a right to sue, which is evident from the relevant passages in the judgment of Lord Keith of Kinkel which we have quoted in extenso earlier. *Thus, we are unable to accept learned counsel's submission that the government has no reputation. In this regard, in rejecting similar submission made by learned counsel for the defendant in the Court of Appeal, the majority held (and rightly in our view) as follows*:

> [33] Mr Chong Siew Chiang submitted that it has none. We respectfully disagree as reputation is not the exclusive right of a natural person or a body corporate to protect. While it is true that the government cannot be injured in its feelings, its reputation can be injured by a libel.
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> [34] Thus, anything that is said about the government that has a tendency to lower its reputation in the estimation of right thinking members of the public, or to expose it to hatred, contempt or ridicule, will give rise to a cause of action in defamation. It is the same test that is applicable in a claim for defamation between private individuals.
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> [35] We are not suggesting of course that the government cannot be criticised. It can and that right to criticise must be protected as it is a symbol of a functioning democracy. What cannot be done however is to defame the government ... (Emphasis added.)

[70] Plainly, therefore, contrary to the erroneous arguments of learned counsel for the appellant, this court in *Chong Chieng Jen*, appreciated the important distinction between a cause of action and the standing to sue. The contention of learned counsel was therefore premised on a mistaken reading of the judgment of this court. What has been completely overlooked by learned counsel is that in point of fact, this court had ruled in *Chong Chieng Jen*, that the state government has the necessary locus which is reinforced by s 3 of Act 359 and further has the necessary cause of action to maintain a defamation suit for reasons that the state government has 'governing reputation'. This is what learned counsel singularly failed to point out. Hence, learned counsel's submission that this court in *Chong Chieng Jen* failed to appreciate the distinction between locus standi and a cause of action is patently incorrect.

[71] In *Chong Chieng Jen*, Ahmad Maarop PCA (as he then was) had further

offered another reason why the *Derbyshire* principle is not suitable for application in Malaysia — that although art 10 of the Federal Constitution guarantees freedom of speech, it is not an absolute or unfettered right. His Lordship cited the decision of this court in *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77 which says that 'freedom of speech is not a licence to defame people'.

[72] Thus, this court's pronouncements in *Chong Chieng Jen*, may be summed up as follows: Act 359 is specific written law governing proceedings against a government, both federal and state in which case, there is no need to call upon the common law. Under s 3 of Act 359, such government has a statutory right to sue. Further, there was nothing under s 3 or Act 359 as a whole which could be construed as prohibiting or restricting the government from suing in defamation. If an individual made an allegation critical of a government, which allegation if made against another individual would have afforded that other individual ground to sue, then the government could sue in defamation. Therefore, the appellant's submission in that appeal that the government could not sue for defamation as it did not have a reputation that could be defamed could not be accepted. This court in *Chong Chieng Jen*, then unanimously held that the majority decision of the Court of Appeal had rightly decided on this point.

[73] From these decisions, it may be said that the *Derbyshire* principles as originally pronounced in *Derbyshire*, to apply to local authorities and subsequently extended to political parties and public figures in *Goldsmith*, and *Rajagopal* as discussed above clearly debar local authorities, political parties and public figures from suing in defamation. These cases, in essence, pronounce that such organs and entities do not have cause of action in defamation in relation to criticisms or comments on matters arising or related to acts or conduct in the discharge of their official duties. The elements of public interest and right of free speech were material considerations for this approach of the courts.

[74] Our apex court in *Chong Chieng Jen* declined to apply the *Derbyshire* principle in the context of a government, finding that for defamation, the common law of England does not apply in the face of specific law under Act 359. The government has a statutory right of action under Act 359 to sue in civil proceedings and such cause of action includes actions for defamation as there is nothing expressly provided in Act 359 to say that defamation actions are excluded.

[75] In our instant appeal, the provisions of Act 359 are obviously not applicable to a society which is what the respondent is. Hence, *Chong Chieng Jen* is of no application in this appeal. What is relevant is the recent decision of

this court in *Lim Guan Eng* which we must now examine in some detail. This decision, post *Chong Chieng Jen* concerned the issue of whether as a result of that decision, can a government official still sue for defamation in his or her official capacity.

[76] In allowing the appeals and answering in the affirmative, the majority in the Federal Court held that the appellant was suing in his individual capacity as a private citizen and not by the office of the Chief Minister or the state government — para 91. As such, he was entitled to sue to protect his personal reputation.

[77] These are the material facts in *Lim Guan Eng*. The plaintiff, Lim Guan Eng was at the relevant time, the Chief Minister of the State of Penang, State Assemblyman for Air Puteh and Member of Parliament for Bagan. The first defendant was the Chief Information Officer of a political organisation called Pertubuhan Pribumi Perkasa Malaysia whilst the second defendant was its President. Perkasa was the third defendant while the remaining defendants sued were editors and publishers of several dailies. On 12 August 2011, the plaintiff's press secretary issued a media statement stating in essence that the plaintiff was making an official visit to Singapore from 11 August 2011, that the purpose of the visit was to develop investment potential and promote medical tourism. In the course of the visit, the plaintiff attended a dinner together with his officers and one Datuk Seri Kalimullah Hassan and the Chief Executive of Temasek Holdings.

[78] On 1 October 2011, the first defendant issued a press statement which was carried in the several dailies sued, contents of which, in essence are as follows:

(a) suggested the plaintiff attended a secret meeting between the political parties DAP and PAP, together with Datuk Seri Kalimullah Hassan and one Datuk Muhammad Azman Yahya;

(b) sought the disclosure of the meeting agenda;

(c) questioned whether Datuk Seri Kalimullah Hassan and Datuk Muhammad Azman Yahya had previously organised similar meetings; and

(d) stated that the whole country was entitled to question the loyalty of the plaintiff, Datuk Seri Kalimullah Hassan and Datuk Muhammad Azman Yahya in relation to the visit.

[79] After a full trial, the plaintiff's claim for damages for defamation was allowed. Only the first three defendants appealed while the plaintiff cross-appealed on quantum of damages.

[80] The Court of Appeal dismissed the defendants' appeals on liability but nevertheless allowed the appeals and dismissed the plaintiff's claim on the following main grounds:

(a) relying on its earlier decision in *Utusan Melayu (M) Bhd v Dato Seri DiRaja Hj Adnan bin Hj Yaakob* [2016] 5 MLJ 56; [2016] 5 CLJ 857, and applying the *Derbyshire* principle, the plaintiff has no locus standi to sue for defamation in his official capacity;

(b) under the *Derbyshire* principle, a democratically elected government and holders of public office should be open to uninhibited public criticism in respect of public administration and affairs; to do so would be an undesirable fetter on the freedom of speech; the individual however, is not restricted from suing in his personal capacity where his individual reputation may have been wrongly impaired;

(c) even assuming the *Derbyshire* principle is not part of Malaysian law, the same reasoning would emanate from the right to freedom of speech in art 10 of the Federal Constitution to discuss, amongst others, government; and

(d) the plaintiff was suing in his official capacity in which case the claim must be dismissed.

[81] After discussing the law on defamation, the Federal Court in its majority judgment found that there was a wrong assessment of the facts by the Court of Appeal. The minority decision examined the same facts and came to a diametrically opposite conclusion, supporting the conclusion by reference to the question of law posed. Be that as it may, the majority in the Federal Court found that the defamatory words in question 'was specifically and personally targeted at the plaintiff'; that it was 'unfortunate' for the Court of Appeal to make the assumption that it was the plaintiff's administration that was criticised and not the plaintiff personally; that the pleadings indicated that the action was brought by the plaintiff personally and not in his official capacity as Chief Minister; that the plaintiff was suing as a private citizen and not by the office of the Chief Minister or the Government of the State of Penang; and that the sting of the impugned statements was more a criticism of the plaintiff rather than his officer or the Penang State Government. All of this led Harmindar Singh FCJ, writing for the majority in the Federal Court to conclude that 'I do not think, therefore, that the plaintiff was disentitled from bringing the action as an individual to protect his reputation'.

[82] Insofar as the *Derbyshire* principle is concerned, the majority judgment examined the approach of the courts in several jurisdictions pre and post *Derbyshire*, before concluding that:

(a) the pre-*Derbyshire* stand evinced 'advocating the barring of any civil

A action preventing suits for defamation by a government authority against critical individual citizens' unless actual malice could be established;

(b) what the *Derbyshire* principle is (to avoid repetition, this has already been discussed earlier in this judgment); and

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(c) post-*Derbyshire*, the courts have often held that while a government and its organs cannot sue for defamation, an individual public officer can do so with no distinction drawn between whether the public officer is suing in his personal or official capacity; that in fact, the cases expressly recognised that an individual public officer can sue for defamation in respect of statements concerning his work performance in a government body and the only requirement is that the officer must be sufficiently identified in the impugned statement.

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[83] The Federal Court held it was this personal or individual reputation of public officers that was deserving of protection; noting that even in the instance of non-individuals such as trading companies, the trend was also changing to deny corporations of a cause of action (see *Redeemer Baptist School Ltd v Glossop; Redeemer Baptist School Ltd v Fairfax Community Newspapers Pty Ltd* [2006] NSWSC 1201).

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[84] Specifically, on the issue of the *Derbyshire* principle, the Federal Court held that although the UK Government could always sue for any private law infringement, it is now contrary to the public interest to do so in view of the *Derbyshire* principle, for the reason, amongst others, that to admit such actions would place an undesirable fetter on freedom of speech. As for the position of the *Derbyshire* principle in Malaysia, the Federal Court, after examining its earlier decision in *Chong Chieng Jen* and finding that decision to be of no assistance in the appeal, just as we have found to be the case in this appeal, concluded that the application of the *Derbyshire* principle here 'remain a live question'.

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[85] In any event, our instant appeal can be distinguished from the case of *Chong Chieng Jen* as *Chong Chieng Jen* involves a state government, hence Act 359 applied. Unlike a society, the Government can sue and be sued in its own name. It is a legal entity by itself. While MCA, in our case, is a mere political party which is dependent on its members to take an action. The respondent in this appeal filed this action for defamation not for himself but for the political party. This is abundantly clear from para 1 of the statement of claim which reads:

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1. The Plaintiff is the public officer of a society registered as Malaysia Chinese Association (MCA) and having its address at 8th Floor, Wisma MCA, 163, Jalan

Ampang, 50450 Kuala Lumpur, *and is suing for and on behalf of MCA*. (Emphasis added.)

[86] It is our view, before we can even properly consider the question of application of the *Derbyshire* principles, we cannot ignore the legal position of the respondent, that as a registered society, the respondent is not a legal entity which can sue and be sued in its own name. Consequently, it does not even have any reputation to complain about. Even if we were to look at the pleadings of the respondent, there is only a one liner in para 7 of its statement of claim where it is pleaded 'Akibatnya, reputasi plaintif telah terjejas dengan serius/teruk' (In consequence the plaintif's reputation has been seriously injured).

[87] Assuming for a moment the respondent does have reputation, which we have already said it does not, how such reputation was seriously injured was not pleaded. In *Mak Khuin Weng v Melewangi Sdn Bhd* [2016] 5 MLJ 314, although the Court of Appeal recognised that a limited company may sue for libel calculated to injure its reputation in the way of its business (trading reputation) without proof of special damage, it was nevertheless important to note that in defamation, all the required elements to prove the elements of the tort must be pleaded and that at the stage of the plaintiff's case itself, it must be established that there is a viable cause of action in defamation. For a company to succeed in libel, the plaintiff company must plead and prove that the words complained of injuriously affected the company. It is not sufficient to rely on an innuendo when the complaint of misconduct is clearly related to its staff. Here, even in learned counsel for the respondent's submission, there was no explanation, mention or submission on how the respondent's (plaintiff's) reputation had been seriously affected. Therefore, we were not convinced that the respondent had any reputation that had been injured.

[88] On the question of whether the *Derbyshire* principle as orginally propounded in *Derbyshire* and extended to political parties by *Goldsmith* and *Rajagopal*, we are of the view that there is no reason why that principle should not apply with equal persuasion in the context of the present appeal. We cannot discern from the majority decision in *Lim Guan Eng* any indication to its non-application. The reason is not hard to appreciate. A political party relies on the public to get their votes to be in power. The political party puts itself forward for office or to govern and be responsible for public administration. It is not right nor is it in the public interest to put the public in fear of a defamation suit and prevent them from expressing their views or making criticisms or voicing out opinion. To allow this to happen definitely goes against the true value of democracy. As explained in *Goldsmith*, there is strong justification to withhold the right to sue to such political parties. The individual members of the political party retain a right to sue (if they can prove

such injury) but insofar as the respondent political party who is the real plaintiff is concerned, it can always 'answer back through public announcements', press conferences or press statements or such similar social media.

[89] As submitted by learned counsel for the appellant, MCA is a component political party of the then ruling government in Malaysia. The respondent, Ong Ka Chuan, in this suit, sued in the capacity as a public officer of MCA. Relying on the reasoning in *Goldsmith* which followed *Derbyshire* and for other reasons as explained above, MCA, in our view whether as a component political party to the then ruling government or a political party on its own, clearly has no cause of action to maintain the present alleged defamation suit against the appellant. We agree with the appellant that in a free democratic society in Malaysia, MCA as a political party must not be thinned-skinned and must always be open to public criticism.

CONCLUSION

[90] Based on the above, we unanimously agree with the submissions of learned counsel for the appellant that a political party such as MCA in this appeal, cannot maintain a suit for defamation. We answer the question posed in the negative. We set aside the decisions of the High Court and the Court of Appeal. We therefore allow the appeal with no order as to costs. Enclosure 6 is accordingly allowed and the suit is struck off.

Harmindar Singh FCJ (delivering concurring judgment of the court):

[91] I have had the privilege of reading the judgment of my learned sister, Zaleha Yusof FCJ and I support the conclusions stated therein. Since we were told that the issue before us was a novel one, it would be appropriate and fitting that I add my views on the question of whether a political party can maintain an action in defamation.

[92] To recap, this appeal was directed against the Court of Appeal's decision in affirming the High Court's decision. The High Court had dismissed the appellant/defendant's application to strike out the respondent/plaintiff's claim for an alleged tort of defamation on the ground that the plaintiff, being a political party, had no locus standi to file a defamation suit.

[93] Undeterred, the appellant here obtained leave of this court to appeal on the sole question of law as follows:

> Whether a political party can maintain a suit for defamation having regard to the decisions in *Goldsmith & Another v Bhoyrul & Others* [1998] QB 459 and *Rajagopal v Jayalalitha* [2006] 2 MLJ 689.

THE BACKGROUND

[94] I am grateful to my learned sister Zaleha Yusof FCJ for having carefully set out the background facts in Her Ladyship's judgment. I am therefore spared from repeating the same except to state the following salient facts. The appellant is a Member of Parliament. The respondent, being the public officer of the political party Malaysia Chinese Association ('MCA'), filed an action against the appellant for an alleged defamatory statement issued by the appellant at a press conference held at the corridor of Parliament on or about 15 March 2017. In essence, the statement alleged that MCA, despite receiving funds from public donations and the government for the purpose of assisting Chinese schools, kept the funds for itself.

[95] Now, the High Court in dismissing the application to strike out the respondent's claim relied on the decision of this court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 which rejected the principle in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011 where the House of Lords, inter alia, held that a local authority and a local government body could not sue for defamation. The Court of Appeal dismissed the appeal by the appellant here without making any pronouncement on the question of whether a political party can maintain a suit for defamation.

THE ARGUMENTS

[96] The arguments raised by both parties are stated in detail in the judgment of Zaleha Yusof FCJ. In essence, the appellant asserted that there is a difference between a cause of action and the standing to sue or locus standi. Citing the decision of the Court of Appeal of New York in *Ward v Petrie* 157 NY 301; 51 NE 1002 , the appellant submitted that 'there is a difference between capacity to sue, which is the right to come to court, and a cause of action, which is the right to relief in court'.

[97] The appellant argued that a political party cannot sue in defamation, having regard to the decisions in *Goldsmith v Bhoyrul* and *Rajagopal v Jayalalitha*. These cases had extended the principle expounded in *Derbyshire*, that a local authority did not have the right to maintain an action for damages for defamation, to political parties.

[98] Further, as the respondents' case, with which the courts below agreed, is governed by the decision of *Chong Chieng Jen*, the correctness of that decision has to be called into question. It was submitted that it is not good law because the Federal Court in that case fell into error in at least two respects:

A (a) first, the Federal Court in that case failed to appreciate the crucial distinction between a cause of action and the standing to sue; and

(b) second, the Federal Court in that case overlooked s 39 of the Government Proceedings Act 1956 ('the GPA 1956') as decided by the B Court of Appeal in the case of *Kerajaan Malaysia v Ambiga Sreenevasan & Ors* [2016] 5 MLJ 721.

[99] The respondent, unsurprisingly, relied heavily on the case of *Chong Chieng Jen*. It was contended that since the Federal Court in *Chong Chieng Jen* C ruled that s 3 of the GPA 1956 did not prohibit the government from suing for defamation; likewise s 9 of the Societies Act 1966 ('the SA 1966') did not restrict a society like the respondent from suing for defamation. In short, the respondent is effectively saying that if the government is allowed to maintain an action for defamation, then by extension, a political party should not be D similarly restrained from doing so.

ANALYSIS AND DECISION

[100] At first sight, the respondent's argument appears compelling for two E reasons. The first was stated earlier in that if the government was allowed to sue for defamation, a political party by extension ought not to be denied as well. Secondly, this court in *Chong Chieng Jen* had held that the *Derbyshire* principle has no application in Malaysia. It must follow that the reasoning applied in *Derbyshire* cannot be applied to a political party as well. So, in my respectful F view, the decision in *Chong Chieng Jen* is really quite pivotal to the instant appeal and cannot be ignored.

[101] In *Chong Chieng Jen*, the plaintiff, the State Government of Sarawak, G sued the defendant, a member of Parliament and a state assemblyman, for defamation. The alleged defamatory statements were statements made by the defendant concerning the mismanagement of state finances, published in the media. The central issue was whether the State Government has the right to bring an action for defamation, in light of the *Derbyshire* principle.

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[102] This court unanimously held that the *Derbyshire* principle is not applicable in Malaysia. The reasoning of the court may be summarised thus:

(a) the *Derbyshire* principle is a principle of the common law in England. I The court should be wary of importing English common law principles when legislation in Malaysia has already provided for the principles of law to be applied;

(b) the right of the Federal and State Governments to sue is a statutory right, specifically provided in s 3 of the GPA 1956. The statutory right of the

State Government to sue in civil proceedings is not subject to the common law of England;

(c) under the GPA 1956, the right of the government to bring civil proceedings is broadly defined to include any proceeding whatsoever of a civil nature before the court. This includes the right to sue for defamation;

(d) under s 3 of the Civil Law Act 1956, the common law of England can only be applied where no provision has been made by any written law in Malaysia. Since s 3 of the GPA 1956 is a specific law in force concerning the right of the government to sue, the common law principle in *Derbyshire* does not apply; and

(e) the freedom of speech provided in art 10 of the Federal Constitution is not absolute. Article 10(2)(a) specifically authorises Parliament to impose restrictions to provide for defamation. Thus, the *Derbyshire* principle is not suitable for application in the Malaysian context.

[103] Now, it is pertinent to observe that the criticism against the decision in *Chong Chieng Jen* is not new. In the recent case of *Lim Guan Eng v Ruslan bin Kassim and another appeal* [2021] 2 MLJ 514 ('Lim Guan Eng'), this court had to contend with the core issue of whether an individual who holds political office or is a government official is disentitled from bringing an action in defamation in his official capacity. The appeals there arose pursuant to the granting of leave on the following question:

> Does the decision of the Federal Court in *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300; [2019] 1 CLJ 329 allow a Government Official to sue for defamation in his or her official capacity bearing in mind the decision in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011, not being applicable under Malaysian law?

[104] In short, the plaintiff there submitted that if the Government can sue for defamation, then by extension the plaintiff, as a public official, should be equally entitled to commence such an action. To preclude a public officer from suing for defamation, it was argued, would lead to an anomalous position.

[105] Now, the majority in that case held that the case of *Chong Chieng Jen* did not assist the appellant there as an individual's right, albeit a public official, to bring defamation proceedings was different from the state government as different considerations apply. Nevertheless, the majority dealt with the submissions of the parties with regard to *Chong Chieng Jen* and considered a diaspora of decisions from most Commonwealth jurisdictions and came to the following view:

A [85] Firstly, although there needs to be a balance in the protection of free speech on the one hand and the protection of individual reputations on the other, freedom of speech and expression remains sacrosanct and should be protected at all costs. It is worth noting that some of the jurisdictions from which the above decisions have emerged do have very similar constitutional protections to our own constitutional B guarantees of freedom of expression as enshrined in art 10(1)(a) of the Federal Constitution .

[86] Secondly, it is an anathema to a modern constitutional democracy to permit elected government authority to commence actions for damages for defamation against its citizens for the simple reason that it is those citizens who decide on that C government or authority being placed in power. In other words, an elected governmental institution owes its very survival to those voting citizens and to the process bringing about its existence. In similar vein, it is also incompatible that government litigation against its own citizens be funded by those very citizens who contribute to their coffers.

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[106] The majority, in observing that the decision in *Chong Chieng Jen* to be in stark contrast with all other jurisdictions, noted as follows:

[173] Now, of course, this decision stands in stark contrast to all the cases discussed earlier, which all provided that it is an anathema to a modern constitutional E democracy to permit elected government authority to commence actions for damages for defamation against its citizens. Perhaps Gleeson CJ described it best in the *Ballina Shire Council* case (at p 691):

> [T]o maintain that an elected governmental institution has a right to a reputation as a governing body is to contend for the existence of something that F is incompatible with the *very* process to which the body owes its existence.

[174] To put it in less elegant terms, the elected government authority owes its very being to those voting citizens upon whom it now seeks to recover damages for defamation. It is irreconcilable, *a fortiori,* that government litigation against its own citizens be funded by those very citizens who contribute to their coffers. Such G governmental authority already enjoys easy access to the media. It will be easy for the authority to ensure that its rejoinders are well reported in all the media. Further, in the case of an elected authority, to say that it has a governing reputation is awkward as the authority would be temporarily controlled by one political party or another. The reputation is really that of the governing party. As aptly noted by Kirby H P in *Ballina Shire Council,* 'The Council's reputation must depend upon the opinion of citizens, earned or lost in the democratic political debate'.

[175] Also, reliance on s 3 of the GPA 1956 alone, as the court appears to have done to answer the issue, is problematic as that section is merely an enabling provision which allows the government to commence civil proceedings against any person. I Such a provision is found in all Commonwealth countries. Even in the United Kingdom, the birthplace of the *Derbyshire* decision, we will find the Crown Proceedings Act 1947 ('the CPA 1947') which provides for civil proceedings by or against the Crown and the procedure in which such proceedings can be undertaken. Our GPA 1956 is in fact modelled after the CPA 1947. In the early days, the Crown could always bring civil proceedings against its citizens but the citizens could only

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> do so against the Crown via a difficult and circuitous route. The CPA 1947 was passed to make it easier for ordinary citizens to sue the UK Government and to get around the old feudal myth that the Crown could do no wrong (see *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325).
>
> [176] The upshot is that although the UK Government could always sue for any private law infringement, it is now contrary to the public interest to do so in view of the *Derbyshire* decision for the reason, amongst others, that to admit such actions would place an undesirable fetter on freedom of speech. So, the question of whether it would be against the public interest for a government to sue its citizens for damages for defamation in Malaysia, like in all other Commonwealth countries, must remain a live question.

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[107] Accordingly, I am constrained to agree with the submissions of the appellant that the decision in *Chong Chieng Jen,* with the greatest of respect, suffers from a fatal infirmity in that the court had failed to appreciate the crucial distinction between a cause of action and the standing to sue as alluded to at the outset. Although s 3 of the GPA 1956 enables the government to initiate a civil action by way of court proceedings, this provision merely explains how a government can initiate proceedings. Such right to sue is however not an absolute one. It must be read together with s 39 of the GPA 1956 as was correctly decided by the Court of Appeal in the case of *Kerajaan Malaysia v Ambiga Sreenevasan & Ors* [2016] 5 MLJ 721.

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[108] In other words, although the government has a statutory right to sue, this does not mean that the government has a right to maintain an action in defamation. The courts still have to rely on the common law principles in an action for defamation. With respect, and for all the reasons mentioned aforesaid, I do not see why the *Derbyshire* principle is objectionable. To reiterate, the overriding principle was stated thus in *Derbyshire*: 'It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech'.

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[109] In any event, it is extremely doubtful if any government can ever have a 'governing' reputation. The government is a representative of people and it would be quite remarkable for the government to have a reputation although individual members in the government have the right to sue. In the New South Wales Court of Appeal, Australia in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, Gleeson CJ expressed his misgivings in this context in the following way (at p 691):

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> The idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the

A expectation that this process will improve the quality of the government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens in a community govern themselves. To treat governmental institutions as having a 'governing reputation' which the common law will protect against criticism on the part of citizens is, to my B mind, incongruous. I regard the matter as turning upon the concept of reputation, and the nature of the reputation which the law of defamation sets out to protect. I understand that concept in its application to individuals (including individual politicians), trading corporations and other bodies, but I have the greatest difficulty with the concept in its application to the governing reputation of an elected C governmental institution. The right of an individual, even one in public life, to his or her personal reputation is one thing. Such a right can be recognised and protected by the law without undue interference with the right of free speech. On the other hand, to maintain that an elected governmental institution has a right to a reputation as a governing body is to contend for the existence of something that is incompatible with the very process to which the body owes its existence.

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[110] Coming now to the leave question, there is no dispute that the cases of *Goldsmith v Bhoyrul* and *Rajagopal v Jayalalitha* extended the principle expounded in *Derbyshire*, that a local authority did not have the right to E maintain an action for damages for defamation, to political parties. The facts in those two cases have been set out in detail by my learned sister Zaleha Yusof FCJ in Her Ladyship's judgment. So, I would only need to restate the legal principles which were decided in the two cases for emphasis.

F **[111]** To recap, in *Goldsmith v Bhoyrul*, the defendant filed an application to strike out the plaintiff's case on the ground that a political party could not sue in defamation. In stating that the *Derbyshire* principle must apply equally to a democratically electable political party, Buckley J held (at the headnotes):

G In a democratic society those who held office in government or were responsible for public administration had always to be open to criticism and therefore it was contrary to the public interest to permit them to sue in defamation because that would place an undesirable fetter on freedom of speech. That principle applied also to political parties seeking power at an election and putting themselves forward for office or to govern, since defamation actions or the threat of them would similarly H constitute a fetter on free speech at a time and on a topic when it was clearly in the public interest that there should be none. Accordingly, the defendants' application would be granted and the court would strike out the second plaintiff's claim.

[112] In *Rajagopal v Jayalalitha*, the action for defamation did not concern a I political party directly. It was an action by a Chief Minister of the State of Tamil Nadu and who was also the General Secretary of a political party. The action in defamation was filed against a bi-weekly magazine which published unflattering articles regarding the Chief Minister. Nevertheless, the High Court of Madras accepted the *Derbyshire* principle and pronounced as follows:

> 23 Thus law is well settled that so far as Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them. In the case of public officials, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties and this is so even where the publication is based upon the facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. In respect of private matters, none can publish such matters without his consent, but the position would be different if he voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

[113] Even so, it needs mention that the issue of whether public officials can maintain an action for defamation in the discharge of their public duties has already been decided by this court in *Lim Guan Eng* where the majority held that an individual, whether acting in his official or private capacity, can maintain an action for damages in defamation. The majority were not persuaded that the principle in the celebrated American case of *New York Times Co v Sullivan* (1964) 376 US 254 ('NYT v Sullivan'), which case appears to have inspired the High Court of Madras in *Rajagopal v Jayalalitha,* should apply in Malaysia.

[114] The majority in *Lim Guan Eng*, was of the view that although there is much to be commended for the pronouncements in *NYT v Sullivan*, in relation to the importance of the protection of free speech and the media, the 'actual malice standard' has not been followed in any other common law jurisdiction. This is probably the case as the test fails to strike the right balance between free speech and the protection of reputation. It places the media in a powerful position without adequate checks which the law of defamation ought to provide. It also appears unfair and discriminatory in that only public figures are subjected to the standard. It may then deter persons of integrity and ability from seeking public office. Wittingly or unwittingly, the test protects falsehoods and there can be no public interest in disseminating falsehoods.

[115] Be that as it may, extending the *Derbyshire* principle to a political party is based on compelling arguments as stated in the judgment in *Goldsmith v Bhoyrul*. It would be contrary to public interest that a political party, which may in the end run a government if elected by the people, be allowed to maintain an action in defamation against the very voters who had elected the political party to office. The right to sue for defamation would place an undesirable fetter on the freedom of speech. It was therefore of utmost public importance that a political party be open to uninhibited public criticism so that members of the public have all the information required to make an informed

decision as to which political party best represents their interests.

[116] In my judgment, this approach strikes the right balance as any official within the political party who is sufficiently identified in a publication is entitled to sue for defamation. Further, it is fair to say that a political party with all its resources is well placed to counter any unflattering comments against it.

CONCLUSION

[117] In the circumstances, albeit for different reasons, I would agree that the respondent in the instant case, being a political party, cannot maintain a suit for defamation. I would also answer the question posed in the negative. Accordingly, the appeal is allowed with no order as to costs. The decisions of the High Court and the Court of Appeal are set aside. It must follow that the suit is struck out as per the application of the appellant/defendant.

Appeal allowed, decisions of the courts below set aside and the respondent's action as per the application of the appellant struck out.

Reported by Ashok Kumar